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September 5, 1997

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
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Room 222  
Washington, DC 20554

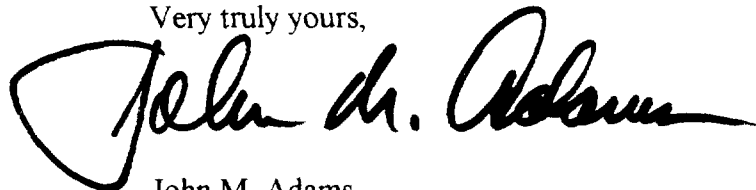
Re: IB Docket No. 96-111; CC Docket No. 93-23, RM-7931

Dear Mr. Caton:

Transmitted for filing on behalf of Space Communications Corporation ("SCC"), are an original and nine copies of SCC's "Reply Comments" in response to the Commission's Further Notice of Proposed Rulemaking ("Further Notice") in the above-referenced proceeding.

Any questions regarding the above should be directed to the undersigned.

Very truly yours,



John M. Adams

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

SEP 5 1997

In the Matter of	)	
	)	IB Docket No. 96-111
Amendment of the Commission's Regulatory	)	
Policies to Allow Non-U.S.-Licensed	)	
Space Stations to Provide Domestic and	)	
International Satellite Service in the United	)	
States	)	
	)	
and	)	
Amendment of Section 25.131 of the	)	CC Docket No. 93-23
Commission's Rules and Regulations to	)	RM-7931
Eliminate the Licensing Requirement for	)	
Certain Receive-Only Earth Stations	)	
	)	
and	)	
COMMUNICATIONS SATELLITE	)	File No. ISP-92-007
CORPORATION Request for Waiver of	)	
Section 25.131(j)(1) of the Commission's	)	
Rules As It Applies to Services Provided	)	
via the Intelsat K Satellite	)	

**REPLY COMMENTS OF SPACE COMMUNICATIONS CORPORATION**

By its Attorney:

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September 5, 1997

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## **SUMMARY**

Space Communications Corporation, of Japan ("SCC"), the owner of the SUPERBIRD-C satellite located at 144°E, hopes to be able to provide a wide range of communications services within and between many of the countries in the Asia Pacific region, including the United States. SCC believes that the proposals set forth in the Further Notice are a welcome and constructive approach to liberalizing the market for the international provision of satellite services in the United States. However, SCC is concerned that the implementation of the proposed requirements should be handled in a neutral manner that does not disadvantage non-U.S. systems. To this end, a number of clarifications would be appropriate in the Further Notice on DISCO II.

First, the "very high risk to competition" test, and the nature of an opposing party's burden, should be more precisely defined by the Commission to clarify that it is risk of injury to "competition" and not "competitors" that will be examined under the test. Further certain procedural matters should be clarified to ensure that oppositions to a letter of intent from a non-U.S. system to participate in a satellite processing round or seek an earth station license are not used to delay or disadvantage the non-U.S. system absent a showing of specific facts suggesting that a very high risk to competition exists.

Second, to remain consistent with the U.S. WTO "national treatment" obligations, the ECO-Sat test the Commission proposes to employ in the event that a non-U.S. system from a WTO-member seeks to provide service between the U.S. and a non-WTO-member country should apply equally to U.S. and non-U.S. owned systems.

Third, to ensure they do not enjoy an unfair competitive advantage, SCC favors application of the "route market" over the "critical mass" test to applications from IGOs

and supports the examination the Commission proposes to apply to activities of the affiliates of IGOs. SCC is unsure why the headquarters country should be used to designate the home market of the affiliate and believes, instead that the ownership of the affiliate should be examined.

Fourth, SCC believes that the assessment of whether a non-U.S. system is 2 degree compliant should apply only to the links between the satellite and U.S. earth stations. Imposition of such a requirement arguably would be an impermissible extension of the Commission's jurisdiction that would intrude upon the prerogatives of other domestic licensing authorities.

Fifth, in administering this spectrum management policy, the Commission should ensure that non-U.S. systems are not penalized if they happen to have ongoing coordination difficulties with U.S. systems in other arenas. In this manner, the letter of intent and earth station processes would not be able to be used in a discriminatory manner to the prejudice of non-U.S. systems.

Sixth, the Commission should clarify the conditions that must be met in order for an earth station license application from a non-U.S. system to receive consideration, including that non-U.S. systems only need to have initiated ITU coordination in order for their applications to be considered. These requirements should be precisely equal to those imposed on U.S. systems.

Finally, SCC believes that the Commission should require IGO's seeking to use receive-only earth stations should be required to seek a license in order that they not gain an unfair competitive advantage over non-U.S. systems.

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**REPLY COMMENTS OF SPACE COMMUNICATIONS CORPORATION**

Space Communications Corporation ("SCC"), of Japan, hereby submits its Reply Comments in response to the Commission's Further Notice of Proposed Rulemaking ("Further Notice") in the above-referenced proceeding.<sup>1</sup>

**I. INTRODUCTION**

1. **Background.** SCC was established in 1985 by Mitsubishi Corporation and other Mitsubishi Group companies. SCC is currently operating two satellites (SUPERBIRD-A and SUPERBIRD-B, located at 158°E and 162°E respectively) providing commercial Ku-band and Ka-band FSS (Fixed Satellite Service) communications services to Japan and some neighboring countries. These services include the provision of a wide variety of satellite communication services to TV and

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<sup>1</sup> See FCC 96-21 (released May 14, 1996).

cable TV stations, corporations and government bodies. On July 28, 1997, SCC launched its additional third satellite, SUPERBIRD-C, which will offer commercial Ku-band service to a wider geographic service area.

SUPERBIRD-C is located at 144°E and its coverage includes most visible areas of the Asia Pacific region (including Japan, China and Southeast Asia), and a beam that is capable of providing service to Hawaii. SCC hopes to be able to provide a wide range of communications services within and between many of the countries in the Asia Pacific region. Therefore, SCC is particularly interested in the Commission's activities in the area of licensing satellite communications services involving access to earth stations located in U.S. territory, and which will utilize non-U.S. satellites.

2. **The Basic Telecom Agreement.** Japan is a member of the World Trade Organization, a signatory to the Basic Telecom Agreement and has submitted a schedule of specific commitments in connection with its accession to the agreement. *See* GATS/SC/46 (February 1997) and GATS/SC/46/Suppl.2 (April 11, 1997). In addition, on June 19, 1997, Prime Minister Hashimoto of Japan and President Clinton reached agreement on a new initiative to enhance the deregulation of the Japanese economy pursuant to the U.S.-Japan Framework Agreement for a New Economic Partnership. *See Enhanced Initiative on Deregulation and Competition Policy* (Denver, June 1997).

In connection with the submission of its schedule, Japan has committed to taking appropriate measures to prevent suppliers, who alone or together are a major supplier of such services, from engaging in or continuing anti-competitive practices. *Id.* at 4.2 These include

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2 A major supplier is defined as a supplier that has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of (a) control over essential facilities or (b) use of its position in the market. *Id.*

anticompetitive cross-subsidization, using information obtained from competitors with anti-competitive results, and withholding or delaying disclosure of technical and commercially relevant information about essential facilities.

Further, Japan is committed to requiring major suppliers to provide interconnection to essential facilities on non-discriminatory terms, in a timely fashion, sufficiently unbundled so that a supplier need not pay for network components or facilities that it does not require to provide service and, subject to a necessary construction charge, to points in addition to the network termination points offered to the majority of users. *Id.*

To ensure transparency, these procedures, regulations and major suppliers' interconnection agreements or reference interconnection offers will be made publicly available. Dispute resolution will be available before an independent domestic regulatory body. Licensing and regulation will be administered impartially by an independent regulatory body separate and independent from any supplier of basic telecommunications services. In addition, all licensing criteria and the terms and conditions of individual licenses will be made publicly available. Reasons for the denial of a license will be provided to an applicant upon request.

Spectrum allocation and radio frequency assignments will be carried out in an objective, timely, transparent and non-discriminatory manner. Universal service obligations also will be administered in a transparent, non-discriminatory and competitively neutral manner.

As of January 1998, the only foreign ownership restrictions, direct or indirect, that will be maintained in Japan will apply to NTT and KDD, which must be at least 80 per cent Japanese owned.<sup>3</sup> All restrictions applicable to Type I telecommunications carriers (basic telecommunications

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3 Board members and auditors in NTT and KDD are required to have Japanese nationality.



services), including their radio station licenses, will be removed. As the Further Notice acknowledges, pending the conclusion of the companion proceeding on non-U.S. participation in the U.S. market, the United States still applies the equivalent competitive opportunities test to foreign ownership restrictions on radio licenses under 47 U.S.C. §310. *See Further Notice*, ¶¶45-46; *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, 1997 FCC LEXIS 2972, at ¶ 68 (adopted June 4, 1997).<sup>4</sup>

Japan now maintains one of the most open telecommunications markets in the world and the pace of further deregulation is increasing as rapidly in Japan as it is in the United States. The proposals set forth in the Further Notice are a welcome and constructive approach to liberalizing the market for the international provision of satellite services in the United States. SCC believes that the elimination of the requirement that non-U.S. satellite systems from WTO member countries must put forward evidence on each of the factors in the ECO-Sat test, and establish the existence of equivalent competitive opportunities in the "home" and "route" markets to be served by the system, represents a sound public policy response to the conclusion of the WTO Basic Telecom Agreement and is consistent with the commitments of the parties. However, SCC has the following concerns.

**II. THE "VERY HIGH RISK TO COMPETITION" TEST, AND THE NATURE OF AN OPPOSING PARTY'S BURDEN, SHOULD BE MORE PRECISELY DEFINED**

SCC is concerned that access to the U.S. market might still be denied to non-U.S. providers, or unreasonably delayed, on the grounds of the "very high risk to competition" test, as

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<sup>4</sup> In this connection, an affiliate of the Japanese carrier IDC, IDC America has received authority from the FCC to engage in international private line resale in the United States. *See International Action: FCC Grants IDC-America Non-Interconnected Private Line Resale Authority*, No. IN 97-7, 1997 FCC LEXIS 1442 (March 18, 1997). However, similar requests from U.S. affiliates of NTT and KDD have been removed from streamlined processing by the Commission. *See "Announcement Concerning the Delay in Certification Procedure by the U.S. FCC with Regard to Provision of International Services by NTTA Communications, Inc. and KDD America, Inc.," New Breeze*, vol. 9, no. 2, p.17 (1997).

described in paragraphs 13, 18 and 19 of the Further Notice. As described in the Further Notice, opposing parties who meet the burden of proof of showing that operations by the non-U.S. system in the U.S. market would pose a “very high risk” to competition in the United States market, which could not be cured by conditions the FCC could place on the license, will be able to defeat an application. As a substantive matter, the Commission should clarify that it is risk of injury to “competition” and not “competitors” that will be examined under the test. As a procedural matter, the Commission should clarify the impact that the filing of an opposition will have upon the treatment of a “letter of intent” to participate in a satellite processing round (*see* Further Notice ¶¶ 50-54) or an earth station application (*see* Further Notice ¶¶ 55).

1. **Injuries to Competition.** Further specifying the relevant factors and analytical process to be employed by the Commission in its review of an opposition to a non-U.S. satellite provider’s request to participate in a processing round or earth station application, will provide greater certainty and transparency in the regulatory process. Before a competitor is found by the Commission to have met its burden, the particular risks identified in an opposition should be shown to be highly likely to have a broad-based impact in the relevant market (market concentration, discrimination, below average variable cost pricing, exclusionary effects of exclusive arrangements or monopoly of supply), not just represent a business threat to a U.S. competitor.

For example, practices that would be considered to be aggressively competitive but not illegal restraints under U.S. antitrust law, such as discount pricing that does not meet the legal standard required by statute for a finding of predatory pricing, should not be deemed to represent a “very high risk” to competition. Thus, SCC agrees with suggestions that a bright line rule against exclusive agreements, even if they do not adversely affect market access for U.S. competitors, is unnecessarily broad and not, in all cases, likely to foster innovation or competition.

Further, the Commission should specify that an opposing party that seeks to demonstrate that a particular non-U.S. satellite poses a very high risk of engaging in practices that derogate from the six principles set forth in the April 24, 1996 WTO Reference Paper on the Regulatory Framework for the Basic Telecommunications Services, or which are inconsistent with the WTO commitments of the home-market nation, must do so based upon specific evidence of those risks as well as an explanation of why permit conditions would be inadequate to protect competition.

2. **Procedural Issues.** The Further Notice does not specify the effect on a satellite processing round of the filing of an opposition to a letter of intent from a non-U.S. system. The Further Notice notes, however, that failure to take part in a processing round could “raise the risk that spectrum or orbital resources will not be available to access the U.S. territory if that system later seeks coordination for U.S. services.” Further Notice, ¶154.

The Commission should clarify that the filing of an opposition to a letter of intent will not prejudice the sponsoring non-U.S. system’s participation in the round. Nor, of course, should the filing of an opposition be permitted to create a related proceeding that could delay the entire round.

A non-U.S. system that elects to participate in a processing round should not face any disproportionate regulatory burden simply as the result of the filing of an opposition. In the event, therefore, that an opposition is filed to a letter of intent by a non-U.S. satellite system, the Commission should consider making an initial determination without delay whether, on its face, the opposition contains a sufficient showing that the opponent likely will be able to meet its burden of demonstrating that a very high risk to “competition” exists.

**III. THE ECO-SAT TEST EMPLOYED FOR SERVICES TO NON-WTO-MEMBERS (ROUTE MARKETS) SHOULD BE APPLIED EQUALLY TO U.S. AND NON-U.S. SYSTEMS**

SCC agrees with the statement in Paragraph 26 of the Further Notice that the ECO-Sat test the Commission proposes to employ in the event that a non-U.S. system from a WTO-member seeks to provide service between the U.S. and a non-WTO-member country should apply equally to U.S. and non-U.S. owned systems. As the Trade in Services Agreement states, in pertinent part:

Formally identical treatment or formally different treatment shall be considered to be less favourable [sic] if it modifies the conditions of competition in favour [sic] of services or service suppliers of the Member compared to like services or service suppliers of any other Member. Article XII.3.

Subjecting non-U.S. systems to the ECO-Sat test, while permitting U.S.-licensed systems to provide service to non-WTO-member countries, whether or not the non-U.S. system is licensed by a WTO member, would be a clear derogation of the national treatment principle. Non-U.S. systems would be unfairly burdened in terms of the expense, delay and additional substantive review the ECO-Sat process would entail. These burdens have a clear impact on the conditions of competition, rendering them “less favorable” in the meaning of the Trade in Services Agreement.

**IV. THE TEST EMPLOYED FOR SERVICES PROVIDED BY IGO AFFILIATES SHOULD BE BASED ON OWNERSHIP FOR HOME MARKETS AND ROUTE MARKETS**

With respect to the activities of the international government satellite organizations (IGOs), SCC is concerned that the “critical mass” test, depending on how it is defined, may enable the IGOs to perpetuate privileged or exclusive access to certain markets, especially in non-WTO-

member countries. . Further Notice, ¶¶32-33. Likewise, SCC shares the concern expressed by the Commission with respect to the potential conduct of the privatized affiliates of the IGOs in the provision of satellite services. SCC agrees that these companies could obtain privileged or exclusive access to markets around the world, particularly in the non-WTO-member countries that hold ownership shares in the affiliates. Further Notice, ¶34.

In regard to the IGOs, SCC is concerned that the critical mass alternative would enable anticompetitive practices with regard to route markets in non-WTO-member countries to escape Commission scrutiny. If the 90 members of INTELSAT that have not made commitments to open and liberalize their markets, either through the WTO process or an equivalent bilateral agreement, can presume they will be treated as if they had because the consortium of which they are part also includes 50 WTO-member countries that have made such commitments, the incentive for these countries to take liberalizing regulatory initiatives is reduced. The primary incentive remains one of price in the route market. As long as IGO services remain priced at a level below which the route market country would have an incentive to promote the creation of competitive supply alternatives, markets may be foreclosed to U.S. suppliers even though prices may be supra-competitive in those markets. The route market nation can be assured of supply and, to the extent that consumer welfare may receive less emphasis in that market, no countervailing pressure may develop.

By contrast, a route market analysis that results in the application of the ECO-Sat test will enable the Commission to promote competition much more effectively. As the Commission points out, the IGOs do not have status under the WTO Basic Telecom Agreement. Further Notice, ¶32. As such, the national treatment concerns that apply in the case of satellite systems from WTO-member countries do not mitigate against taking this approach.

In the case of IGO privatized affiliates, SCC supports the Commission decision to review an affiliate's relationship to its IGO parent to ensure that grant of an application would not pose a significant risk to competition in the U.S. satellite market. Further Notice, ¶36. The structural factors the Commission proposes to consider in this circumstance to prevent collusive behavior, cross-subsidies and denial of market access should be strictly applied. *Id.* SCC is unclear, however, why the headquarters country for the particular IGO affiliate should be considered determinative. Rather, SCC believes that the home market of the IGO affiliates should be determined based upon the ownership of the affiliate.

For example, especially in non-WTO-member countries, most of these owners are likely to be PTTs, and therefore influential with their governments. To the extent that a PTT-owner of an IGO affiliate has, by virtue of its ability to control or effect the business decisions of the affiliate, the ability to obtain preferential treatment, the incentive to that country to take liberalizing initiatives is diminished for the same reasons cited in the example of the IGOs themselves.

**V. THE COMMISSION SHOULD SPECIFY THAT  
NON-U.S. SYSTEMS WILL BE REQUIRED TO  
COMPLY WITH PART 25 TECHNICAL RULES  
ONLY TO THE EXTENT OF THE SYSTEM'S  
U.S. LINKS**

The Commission proposals relating to compliance with its technical rules, especially in the area of 2 degree spacing, are confusing and should be clarified. Further Notice, ¶39. SCC believes that the assessment of whether a non-U.S. system is 2 degree compliant should apply only to the links between the satellite and U.S. earth stations.

Many other nations do not require 2 degree spacing. For non-U.S. systems that are duly authorized by a domestic licensing authority and have completed the coordination process under the ITU's Radio Regulations at greater than 2 degree spacing, the addition of a requirement that the

system would not cause interference to U.S. satellites within 2 degrees on non-U.S. links would unfairly burden non-U.S. systems.

First, the Commission does not require U.S. systems to demonstrate that it is 2 degrees compliant for its non-U.S., international links. *Compare* 47 C.F.R. §25.114 (applications for space station authorizations) and 47 C.F.R. §§25.114(c)(17) and 25.140(b)(2) (qualifications for domestic fixed-satellite space stations). As such, the imposition of such a requirement on non-U.S. systems would unfairly burden these systems in derogation of the national treatment principles under the WTO Trade in Services Agreement.

Second, imposition of such a requirement arguably would be an impermissible extension of the Commission's jurisdiction that would intrude upon the prerogatives of other domestic licensing authorities. For reasons of comity alone, the FCC should refrain from extending its regulatory jurisdiction into areas that are regulated by the domestic authorities of other nations. In Japan, for example, satellite services are provided using the smaller earth stations that are effective only at greater than 2 degree spacing. In this circumstance, the imposition by the Commission of a broad interpretation of the 2 degree compliance provision would act as a complete barrier to entry for systems whose configuration, domestic license and international coordination are based on greater than 2 degree spacing.

Third, the imposition of this requirement upon non-U.S. systems that have already completed the ITU coordination process, including possible coordination with U.S. systems, could reopen numerous coordinations and disrupt the orderly administration of the registration process by the Radiocommunication Bureau. A significant and disproportionate economic burden could be forced upon non-U.S. systems in this event.

Finally, SCC believes the Commission should specify the various technical rules in 47 C.F.R. Part 25 that will apply to non-U.S. systems seeking to enter the U.S. market. If a specific technical requirement could be extended to a non-U.S. system's wholly foreign links, the Commission should nonetheless refrain from applying it any more broadly than is necessary to administer its policies and rules in the U.S. market.

**VI. THE COMMISSION SHOULD ENSURE THAT  
THE LETTER OF INTENT AND EARTH  
STATION PROCESSES ARE NOT USED IN A  
DISCRIMINATORY MANNER TO THE  
PREJUDICE OF NON-U.S. SYSTEMS**

In paragraph 38 of the Further Notice, the Commission states that non-U.S. systems are unlikely to be licensed to serve the U.S. market if doing so would "create debilitating interference problems or where the only technical solution would require licensed systems to significantly alter their operations. Further Notice, ¶38. In administering this spectrum management policy, the Commission should ensure that non-U.S. systems are not penalized if they happen to have ongoing coordination difficulties with U.S. systems in other arenas. For example, to the extent that a non-U.S. and a U.S. system may have an ongoing coordination dispute under the Radio Regulations, the Commission's assessment of an application to serve the U.S. market should remain neutral on the issues in that dispute. This is especially the case where a U.S. system might be tempted to misuse the U.S. processes to obtain leverage in the ITU coordination process against a non-U.S. competitor.

**VII. THE COMMISSION SHOULD SPECIFY THAT  
NON-U.S. SYSTEMS ONLY NEED TO HAVE  
INITIATED ITU COORDINATION IN ORDER  
FOR THEIR APPLICATIONS TO BE  
CONSIDERED**

SCC is concerned that the statement in paragraph 55 of the Further Notice that: non-U.S. satellites must be launched and have initiated ITU coordination in order to have their earth



station applications considered could be misinterpreted when read in light of the statement in paragraph 54 that “systems that are coordinated under ITU procedures would be able to access the United States through the earth station licensing process.” *Compare* Further Notice ¶¶54 and ¶55. The Commission should clarify the conditions that must be met in order for an earth station license application from a non-U.S. system to receive consideration. These requirements should be precisely equal to those imposed on U.S. systems. Thus, as long as the satellite is planned to be launched, the FCC should process the earth station request.

#### **VIII. THE COMMISSION SHOULD REQUIRE IGOs TO OBTAIN LICENSES FOR RECEIVE-ONLY EARTH STATIONS**

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SCC is concerned that non-U.S. systems would bear a disproportionate burden by virtue of the requirement that receive-only earth stations must be licensed. However, based upon the reservation of the United States to its Most Favored Nation obligations under the Basic Telecom Agreement, SCC understands the Commission’s approach to this issue. Further Notice, ¶¶56-58. However, SCC believes that the IGOs or their affiliates that seek to serve receive-only earth stations in the U.S. should likewise be required to obtain licenses. Otherwise, they will have an obvious competitive advantage over the non-U.S. systems that seek to obtain similar authority.

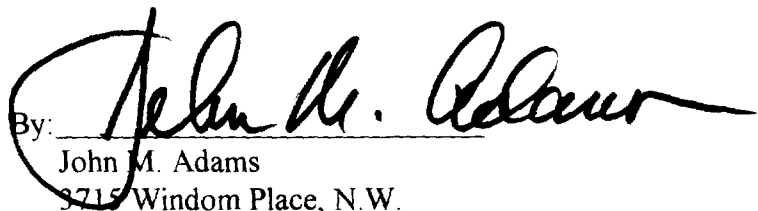
#### **IX. CONCLUSION**

SCC believes that the FCC should adopt the revised market entry policies for non-U.S. licensed systems stated in the Further Notice with certain modifications and clarifications to ensure that the process is implemented in a neutral manner, so that it cannot be subject to misuse to the disadvantage of non-U.S. systems, and that the application by the Commission of its requirements does not impinge upon the legitimate prerogatives of the domestic licensing authorities of other countries.

Dated: September 5, 1997

Respectfully submitted,  
**SPACE COMMUNICATIONS CORPORATION**

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I, hereby certify that true copies of the foregoing "Reply Comments of Space Communications Corporation" were served this 5th day of September, 1997, by hand delivery (\*) or first-class mail, postage prepaid, upon each of the following:

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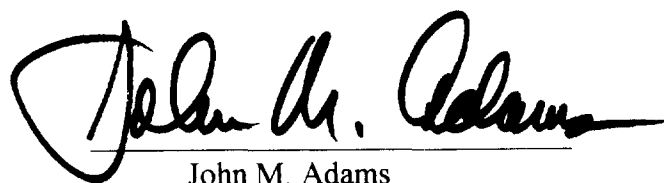
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